SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 985

CYRUS S. EATON,

Petitioner,

—v.—

HAROLD S. HOBSON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Cyrus S. Eaton, petitioner herein, by his attorneys, prays that a writ of certiorari issue to the Court of Appeals for the Sixth Circuit to review the decision of that Court in this case.

Opinions Below

The District Court entered "Findings of Fact and Conclusions of Law" which are not reported but are printed in Appendix B, hereto, and filed a "Conclusion on Remand," which is not reported but printed in Exhibit D, hereto. The opinion of the Court of Appeals is reported at 399 F.2d 781 and is printed in Appendix A, hereto and a supplemental opinion is reported at 399 F.2d 781 and printed in Exhibit C, hereto.

Jurisdiction

Jurisdiction in the District Court was based on 28 U.S.C. § 1332(1).

Judgment was entered by the District Court on June 7, 1966, and a timely appeal followed. The Court of Appeals on September 20, 1968 entered a judgment affirming the order of the District Court, and a petition for rehearing filed by Petitioner was denied on October 29, 1968.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Rule Involved

Rule 52(a) of the Federal Rules of Civil Procedure provides in pertinent part:

> "(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; . . . . Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. . . . If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein . . . ."

Question Presented

When a fiduciary claims that a gift of trust property has been made to him by the beneficiary thereof, and the Court of Appeals has remanded the case for reconsideration of the evidence because such a gift must be proven by clear and convincing evidence rather than by the lower standard of proof erroneously applied by the District Court, is the accepted course of judicial procedure and Rule 52(a) of the Federal Rules of Civil Procedure violated when the Court of Appeals affirms the conclusion of the District Court, upon remand, that the alleged gift has been proven by clear and convincing evidence even though (a) the District Court has made no findings of the facts relied upon by it in reaching this conclusion, and (b) the Court of Appeals did so without making any such findings itself, so that in the end there is a complete absence of any indication of the evidence upon which the courts below based their decisions?

Statement of the Case

Many years ago—between 1930 and 1935—Cyrus Eaton, the well known industrialist, and then a director of the Cleveland Trust Company, loaned certain sums to a vice-president of the bank, Frank Hobson, who was experiencing some financial difficulties. These loans totaled $27,500 and were advanced in part by Mr. Eaton personally and in part by a corporation of which he was the sole stockholder. (399 F.2d at 782, p. 2a, *infra*)

In 1936 Frank Hobson died. Following his death Mr. Eaton assigned the claims against the Frank Hobson Estate

arising out of these loans to a minor employee, Harold S. Hobson, a man no way related to the deceased Frank Hobson, for the sole purpose of collecting these amounts from the Cleveland Trust Company, the executor of Frank Hobson's estate. With respect to the $10,000 advances made by Mr. Eaton personally, Mr. Hobson signed an acknowledgment that the assignment was for "purpose of collection" (399 F.2d at 782-783, pp. 2a-3a, *infra*), and as to all the advances the "trial judge specifically found that the plaintiff [Harold Hobson] was originally designated as agent for collection only." 399 F.2d at 784, p. 6a, *infra*.

Thereupon, Harold Hobson filed the claims with the Cleveland Trust Company as executor of the Frank Hobson estate and the claims were allowed in September, 1936. In February 1938, the executor made a partial distribution to the Estate, issuing a check in the amount of $6,178.58 to Mr. Harold Hobson. Consistent with his obligations as an assignee of these claims for collection only, Harold Hobson disbursed this amount by paying it to Mr. Eaton or on Mr. Eaton's account. 399 F.2d at 783, p. 4a, *infra*.

Further activity in the Frank Hobston Estate was delayed until 1960 when Frank Hobson's widow, who was entitled to income from the remainder of the Estate for her life, died. (399 F.2d at 783, p. 4a, *infra*) By this time Harold Hobson was no longer an employee of Mr. Eaton and had long since gone into another business. (Tr. 2)[1]

In November 1961, on requisition of Frank H. Hobson, Jr., the beneficiary of the Frank Hobson Estate, the claim

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[1] References to the transcript of the record in the District Court are cited herein as "Tr. ——."

asserted against the estate by Harold Hobson was rejected because of the known interest of Mr. Eaton therein. (399 F.2d at 783, p. 4a, *infra*)

Previous Litigation

Thereupon, Harold Hobson brought an action in the United States District Court for the Northern District of Ohio against the Cleveland Trust Company as executor, as well as against the beneficiaries of the Estate. In October 1962 a settlement of that case was concluded pursuant to which Mr. Harold Hobson was to receive approximately $45,000, payable in a series of installments. Mr. Eaton was not a party to this action or otherwise advised of its pendency,[2] and when he learned of it, he brought an action in the Court of Common Pleas in Cuyahoga County to enjoin Cleveland Trust Company and Frank Hobson, Jr. from making any further payments to Harold Hobson pursuant to this settlement agreement. 399 F.2d at 783, p. 4a, *infra.*

Proceedings in District Court

Harold Hobson then brought the present action for a declaratory judgment that he, and not Mr. Eaton, was the beneficial owner of the claims against the Frank Hobson Estate. 399 F.2d at 783, p. 4a, *infra.*[3]

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[2] There is other litigation pending between Mr. Eaton and the Cleveland Trust Company which may have significant impact on the control and management of the Cleveland Trust Company, see *Cleveland Trust Co.* v. *Eaton,* 11 Ohio Misc. 151, 229 N.E.2d 850 (1967).

[3] Mr. Eaton filed a counterclaim in which he sought to have the settlement agreement declared null and void.

At the trial of the case Mr. Hobson based his entire case on his testimony that:

(a) on either the day of the assignment of the claims to him for purposes of collection only or on the day thereafter, Mr. Eaton called him into his office and said, "You take these two claims as a salary bonus." This conversation is conveniently said to have taken place outside the hearing of any witnesses (Tr. 22, 123-126, 399 F.2d at 781, pp. 3a, 17a, 18a, *infra*).

(b) he paid the proceeds of the distribution of part of the Frank Hobson Estate in 1938 to Mr. Eaton because, again conveniently, out of the hearing of any witnesses, Mr. Eaton asked him to "turn over the dividend that was coming from the Frank Hobson estate" but stated "the balance of it, of course, is yours. You may get something out of it some day." (Tr. 39-42, pp. 18a-19a, *infra*)

These two conversations were, of course, denied by Mr. Eaton at trial. (p. 19a, *infra*)

The District Court in its Findings of Fact and Conclusions of Law, held that:

> "It is my conclusion and judgment that plaintiff, Hobson, has proved by a preponderance of the evidence that he is the true and beneficial owner of the claims . . . [against the Frank Hobson Estate]." (p. 24a, *infra*)

Opinion of the Court of Appeals

The Court of Appeals remanded the case to the District Court on the ground that the District Court had applied the wrong standard of proof, *i.e.*, the preponderance of evidence rule. (399 F.2d at 785, p. 8a, *infra*) It held that under Ohio law there was "a presumption that the beneficiary of a trust does not make a gift of trust assets to his fiduciary, that is, his agent or trustee" and that evidence to overcome this presumption must be "clear and convincing." (399 F.2d at 784, pp. 6a-7a, *infra*) The Court of Appeals remanded the case to the District Court "with instructions to the trial judge to reconsider the evidence in the light of the applicable rule of clear and convincing evidence and report his conclusion to this Court," and retained jurisdiction over the appeal. (399 F.2d at 785, p. 8a, *infra*)

Proceedings Upon Remand

On remand, the District Court, without making any further findings, simply submitted to the Court of Appeals a document entitled "Conclusion on Remand" which stated the court's finding and conclusion that "the plaintiff Harold S. Hobson has proved by clear and convincing evidence that he was the recipient of a gift from the defendant, Cyrus S. Eaton, of the beneficial interests in the claims involved herein." (p. 28a, *infra*)

Thereupon, the Court of Appeals issued a supplemental opinion in which, without any further statement as to the evidence relied upon by it, it affirmed the judgment of the District Court. (399 F.2d 785, p. 26a, *infra*)

Reasons Why the Writ Should Be Granted

This case raises important questions relating to the administration of justice and the proper application of Federal rules, especially Rule 52(a) of the Federal Rules of Civil Procedure.

The Court of Appeals held that, under Ohio law, there is a presumption against a gift of trust property to the fiduciary, that such gift must be proved by clear and convincing evidence; and remanded the case for reconsideration of the evidence in the light of that rule.

However, the significant protection which the "clear and convincing evidence" rule should provide against fraud by fiduciaries was severely diluted by the failure of the courts below, after remand, to make any findings indicative of the evidence regarded by them to constitute clear and convincing proof of the alleged gift. The procedures followed by the courts below would, if generally followed, erode and render meaningless the many judicial decisions requiring in certain situations clear and convincing evidence to prevent fraud.[4]

This Court had consistently held that under Rule 52(a) of the Federal Rules of Civil Procedure that "there must be findings, in such detail and exactness as the nature of the case permits of subsidiary facts on which the ultimate conclusion . . . can rationally be predicated." *Kelly* v. *Everglades Drainage District,* 319 U.S. 415, 420 (1943).

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[4] Examples of other situations where the courts have required clear and convincing evidence are to establish a parol trust in real or personal property, where reformation or cancellation of a written instrument is sought, or to impeach an acknowledgment. 30 American Jurisprudence 2d 344.

See *Dalehite* v. *United States,* 346 U.S. 15, 24 n.8 (1953); *Schneidermann* v. *United States,* 320 U.S. 118, 129-131 (1943)

However, in response to the Court of Appeals' remand of the case "to reconsider the evidence in the light of clear and convincing evidence rule," the District Court prepared a "Conclusion Upon Remand" which did nothing more than state in the most conclusionary terms that "upon a careful and thorough reconsideration of the evidence . . . the Court finds and concludes that the Plaintiff Harold S. Hobson has proved by clear and convincing evidence that he was the recipient of a gift, from the Defendant Cyrus S. Eaton . . . ." (p. 28a, *infra*)

Upon receipt of the Conclusion on Remand the Court of Appeals issued a supplemental opinion, simply stating, without any further discussion of the evidence that:

> "We have considered the report of the trial judge together with the briefs of the parties with regard thereto and conclude that the supplemental finding of the trial judge is supported by the evidence and is not clearly erroneous." 399 F.2d at 785, p. 26a, *infra*

As noted above, while the Court of Appeals may well have expected a "report" from the trial judge, the trial judge's characterization of what he did as a "Conclusion on Remand" is far more accurate. Nor, of course, could "the briefs of the parties" deal in a meaningful manner with the District Judge's report with any indication of what evidence it had relied upon as being clear and convincing.

Neither do the "Findings of Fact and Conclusions of Law" or the original opinion of the Court of Appeals refer to any evidence which could reasonably be assumed to have

been relied upon, *sub silentio,* by the lower courts as clear and convincing proof of the alleged gift.[5]

(1) The only affirmative evidence referred to in the Findings of Fact and Conclusions of Law to establish the alleged gift is the self-serving testimony of Harold Hobson.[6]

(2) The opinion of the Court of Appeals contains a fairly detailed statement of facts, but the only evidence of the alleged gift to which it refers is the uncorroborated testimony of Harold Hobson.[7]

Accordingly, the net result of these judicial proceedings below is as follows:

Neither the Court of Appeals nor the litigants know what evidence was considered by the District Court, upon remand, to constitute clear and convincing proof of the alleged gift to Mr. Harold Hobson. The litigants have no idea whether the Court of Appeals' affirmance of the District

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[5] Clear and convincing evidence is defined as " 'that measure or degree of proof which will produce in the mind of the trier of facts a firm belief or conviction as to the allegations sought to be established.' " *Cross* v. *Ledford,* 161 Ohio St. 469, 120 N.E.2d 118, 123 (1954).

[6] The District Court's holding that Mr. Hobson had proven his case by a "preponderance of the evidence" is based solely on events nearly thirty years ago by which Mr. Eaton allegedly concealed from his creditors his ownership of claims against the Frank Hobson Estate. The allegation of such concealment was made by counsel for Mr. Harold Hobson below to support a contention this precluded Mr. Eaton as a matter of law from now asserting his ownership in the claims. It seems quite obvious, however, that even if Mr. Eaton did conceal his assets this would be added proof that Mr. Eaton was the owner thereof and he has not given them to Mr. Hobson. (pp. 20a-23a *infra*)

[7] The Court of Appeals does not even mention in its opinion the alleged concealment of assets from creditors which had formed the basis for the District Court's finding.

Court's Conclusion on Remand was based on the same unstated evidence upon which the District Court relied, or upon some totally different evidence which the Court of Appeals found to be sufficient to meet the clear and convincing test. Not one of the four opinions rendered in this case contains any finding of the "clear and convincing" evidence supposedly proving the purported gift.

This raises, we think serious questions in the administration of justice.

(a) In the total absence of any indication by the courts below of the factual basis of their decision, the beneficiary, whose fiduciary claims a gift of the trust assets, is likely to be left with a deep, abiding feeling that he has been defrauded, and that the courts below have not given proper consideration to his case and have failed to protect his rights. We submit that to assure the proper respect for the courts, their processes and the rule of law, there must be at least a minimal disclosure of the factual basis of the courts' rulings in such cases.

(b) The higher standards of proof required by the courts to avoid fraud in some situations will become uncertain and arbitrary in their application if they are applied not on the basis of facts but merely on the personal feelings and whims of individual judges.

(c) In the absence of findings there can be no assurance that the courts below have reviewed the record, in light of the clear and convincing evidence rule, with the care required to prevent possible fraud by a fiduciary.

As Judge Frank stated in *United States* v. *Forness,* 125 F.2d 928, 942 (2nd Cir. 1942), cert. den. 316 U.S. 694,

> "For as every judge knows, to set down in precise words the facts as he finds them is the best way to avoid

carelessness in the discharge of that duty; often a strong impression that on the basis of the evidence, the facts are thus-and-so gives way when it comes to expressing that impression on paper." Cf. *United States* v. *El Paso Gas Co.*, 376 U.S. 651, 656 (1964).

No judge had expressed on paper the facts which are said to constitute clear and convincing evidence of the alleged gift.[8]

CONCLUSION

For the reasons stated above, we submit that this case represents such a departure "from the expected and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision," (Rule 19, Rules of the Supreme Court of the United States), and that therefor the writ should be granted.

Respectfully submitted,

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[8] One of the most important purposes of findings of fact, pursuant to Rule 52(a), is to "evoke care on the part of the trial judge in ascertaining the facts." *Leighton* v. *One William Street Fund, Inc.*, 343 F.2d 565, 567 (2d Cir. 1965); *Featherstone* v. *Barash*, 345 F.2d 246, 249 (10th Cir. 1965); *United States* v. *Forness*, 125 F.2d 928, *supra* at 942.

Appendix A

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 17480

HAROLD S. HOBSON,

Plaintiff-Appellee,

v.

CYRUS S. EATON,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO

Decided February 12, 1968.

Before: PECK and McCREE, Circuit Judges, and CECIL, Senior Circuit Judge.

CECIL, Senior Circuit Judge. Harold S. Hobson, plaintiff-appellee, brought this action against Cyrus S. Eaton and the Cleveland Trust Co., in the United States District Court for the Northern District of Ohio, Eastern Division, for a declaratory judgment (Section 2201, Title 28, U.S.C.) that he is the beneficial owner of certain claims against the Estate of Frank H. Hobson. The deceased, Frank H. Hobson, was not related to the plaintiff-appellee, Harold S. Hobson, either by family or through business. The District

Court granted judgment to the plaintiff-appellee and the defendant-appellant, Cyrus S. Eaton, appealed. We will refer to the parties as plaintiff and defendant, respectively.

Frank Hobson died in 1936 and prior thereto, from 1930, had been vice-president of the Cleveland Trust Company, hereafter called the bank. The defendant was a director of the bank. During the time in question here, the plaintiff was an employee of the defendant. The claims against the Hobson Estate which are the subject of this action arise out of loans made by the defendant to Mr. Hobson during his lifetime. These loans are in two parts: (1) $10,000 which had been advanced to Mr. Hobson in two personal loans of $5000 each on July 11, 1935 and November 20, 1935, and (2) $17,500 loaned by Industrial Shares, Inc., a holding company, completely owned by the defendant. This $17,500 loan was secured by one note of $12,500, dated December 15, 1930, and two notes of $2500 each, dated February 11, 1931 and April 20, 1931.

In 1936, following the death of Mr. Hobson, the plaintiff and the defendant entered into an assignment as follows:

"ASSIGNMENT

Cleveland, Ohio, July 20, 1936.

For the sum of one dollar, and other valuable consideration, the receipt of which is hereby acknowledged, I hereby sell, assign and transfer to H. S. Hobson all my right, title and interest in and to my claim for $10,000.00 against the Estate of F. H. Hobson evidenced by check for $5,000.00 dated July 11th, 1935, and duplicate deposit slip for $5,000.00 dated November 20th, 1935,

together with interest on the said amounts from the date of the said check and deposit slip.

C. S. Eaton sgd

Cleveland, Ohio, July 20, 1936.

I herewith acknowledge receipt of the above claims which have been assigned to me for the purpose of collection, and I agree to pay to C. S. Eaton any proceeds thereof.

H. S. Hobson"

This transaction occurred in the wake of the great depression of 1929 and 1930. The finances of the defendant, to put it mildly, were highly involved and the Estate of Mr. Hobson was greatly in debt. It was apparently understood between the parties at the time the assignment was made that it was only for the purpose of collection. The plaintiff was to file a claim with the Cleveland Trust Company, as executor of Hobson's estate.

The plaintiff claims that a day or two after the execution of the assignment, the defendant called him into his office and said he had changed his mind about having the claim for collection filed in Hobson's name. He could not afford to have his pending settlement with the banks jeopardized by appearing directly or indirectly as a claimant against the Hobson estate. The plaintiff claims that the defendant said on this occasion:

"You take these two claims as a salary bonus. The amount is very small at best and subject to litigation. There may not be anything left, but whatever comes out of this belongs to you."

The defendant denies this conversation.

On July 21, 1936, the plaintiff filed his claims with the bank as executor of the Hobson estate. The claims were allowed by the executor on September 17, 1936. The executor made a partial distribution of the estate on February 11, 1938. A check was issued to the plaintiff in the amount of $6179.58. The plaintiff disbursed this amount by paying to defendant's personal account with Otis and Company $1961.91 and by paying the balance to the defendant.

In 1937 the Ohio Court of Appeals awarded Julia Hobson, a former wife of the deceased Frank Hobson, the income, for life or until remarriage, from 250 shares of bank stock held by his estate. This delayed further activity in Frank Hobson's estate until her death in December, 1960.

On November 17, 1961, on requisition of Frank H. Hobson, Jr., the beneficiary of the estate of F. H. Hobson, deceased, plaintiff's claim was rejected. Thereafter the plaintiff brought an action in the District Court against the bank as Executor of the Estate of Frank H. Hobson, Frank H. Hobson, Jr., and Frank H. Hobson, Jr., as Executor of the Estate of Myra S. Hobson, for recovery on his claims. This action was settled by agreement of the parties in October, 1962. By this settlement, Mr. Hobson was to receive approximately $45,000, including principal and interest. The defendant, Mr. Eaton, was not a party to this action and when he learned of it he brought an action in the Court of Common Pleas of Cuyahoga County to enjoin the bank and Frank Hobson, Jr., from making any further payments to the plaintiff pursuant to the settlement agreement. A preliminary injunction, which is still in force, was issued pending trial. The plaintiff was not a party to this action and he, being a non-resident of Ohio, brought the action now before us in the District Court.

The defendants in this action were Mr. Eaton and The Cleveland Trust Co. Mr. Eaton filed an answer in which he denied plaintiff's claim. He filed a counterclaim in which he sought to have the settlement agreement declared null and void, to require repayment to the Frank Hobson estate of $8999.96 which had been paid to the plaintiff under the settlement agreement and to have himself declared as the beneficial owner of the claims against the Hobson estate. He also sought an order to have Frank H. Hobson, Jr. and Frank H. Hobson, Jr., Executor of the Estate of Myra S. Hobson, made parties defendant to respond to his counterclaim. Frank H. Hobson, Jr., individually and as executor of the estate of Myra S. Hobson, were made parties defendant. They filed an answer and counterclaim.

The parties entered into a stipulation that the issues raised by the plaintiff's complaint and any defenses interposed thereto be first tried. It was further stipulated that if the issues were determined in favor of the plaintiff this would be a full and complete determination of all the issues raised by any counterclaims of the parties and any defenses interposed thereto. If the issues raised by the plaintiff were decided in favor of Mr. Eaton, the Court would then try the issues raised by the counterclaims.

The district judge found that the plaintiff was the sole beneficial owner of the claims, that the defendant Eaton had no interest in the claims, that the plaintiff was entitled to the proceeds of the settlement agreement and that the counterclaims of the defendants should be dismissed. In finding for the plaintiff, the trial judge concluded that the plaintiff had established his case by a preponderance of the evidence.

One of the assignments of error is that the trial judge erred in applying the preponderance of evidence rule of

proof to the testimony adduced at the trial. It is claimed on behalf of the defendant that the plaintiff should have been required to prove his case by clear and convincing evidence.

Under the law of Ohio there is a presumption that the beneficiary of a trust does not make a gift of trust assets to his fiduciary, that is, his agent or trustee. *Chockley* v. *Jensen,* 104 Ohio App. 399. The trial judge specifically found that the plaintiff was originally designated as agent for collection only. This clearly created an agency relationship between plaintiff and defendant for the specific purpose of collecting these claims. The relation of principal and agent is generally regarded by the courts of Ohio and elsewhere as a fiduciary one whereby the principal places trust and confidence in the agent to faithfully perform the terms of the agency. *Connelly* v. *Balkwill,* 160 Ohio St. 430; *Manhattan Life Ins. Co.* v. *Smith,* 44 Ohio St. 156. Thus, there arises a presumption that the defendant did not make a gift to the plaintiff of the claims which were the subject of the agency.[1]

The defendant argues that in order for the plaintiff to overcome this presumption he must establish by clear and

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[1] Plaintiff's reliance upon the case of *Brown* v. *Ginn, Trustee,* 66 Ohio St. 316 (1902), is misplaced. That case held that an agent for collection is not a trustee of an express trust and could not bring suit in his own name under a statute which allowed actions to be prosecuted only in the name of the real party in interest except a "trustee of an express trust" who could bring an action in his name as trustee. That case does not stand for the proposition that an agent for collection is not a fiduciary and specifically held that "such a contract is rather one of agency."

[2] Clear and convincing evidence is "that measure or degree of proof which will produce in the mind of the trier of facts a firm belief or conviction as to the allegations sought to be established. It is intermediate, being more than a mere preponderance, but not

convincing evidence[2] that subsequent to the assignment the defendant made a gift to him of the claims in question. While ordinarily a presumption may be rebutted or overcome by evidence of equal weight,[3] in Ohio a gift intervivos must be proven by clear and convincing evidence. *Flanders* v. *Blandy,* 45 Ohio St. 108; *In re Estate of Fife,* 164 Ohio St. 449; *Bolles* v. *Trust Co.,* 132 Ohio St. 21.

An assignment of a chose in action without consideration may be the subject of a gift. *Polley* v. *Hicks,* 58 Ohio St. 218. The plaintiff claims that after the initial assignment the defendant gave him the claims as a salary bonus. There was no consideration for this alleged gift. The defendant neither owed the plaintiff any salary bonus nor was there any provision in the contract of employment for the payment of a bonus. Gifts may be made by an employer to his employees. See, e.g., *Renee* v. *Sanders,* 102 Ohio App. 21, affirmed 160 Ohio St. 279. "Bonus normally is a gratuity over and above regulary salary." *Kenney* v. *Spicer Furniture Co.,* 131 N.E.2d 265 (Ohio App.). A bonus, however, may become part of the contract between an employee and an employer and be therefore part of the agreed compensation for service. *Ellis* v. *Elec. Prod., Inc.,* 85 Ohio App. 170; *Mabley & Carew Co.* v. *Borden,* 129 Ohio St. 375. But in the absence of any contract or agreement, a bonus paid by an employer without any return promise made by the employee is in the nature of a gift or gratuity for purposes of determining ownership of the purported gift.

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to the extent of such certainty as is required beyond a reasonable doubt as in criminal cases. It does not mean clear and unequivocal." *Cross* v. *Ledford,* 161 Ohio St. 469, 120 N.E.2d 118, 123 (1954).

[3] *In re Guardianship of Breece,* 173 Ohio St. 542.

We conclude that if the facts are as plaintiff alleges, any relinquishment of the defendant's ownership in his beneficial interest in the claims against the estate of Frank Hobson in favor of the plaintiff would constitute a gift inter vivos. Therefore, the burden was on the plaintiff, Harold S. Hobson, to prove by clear and convincing evidence that he was the recipient of a gift, from the defendant, Cyrus S. Eaton, of the beneficial interest in the claims involved herein. The trial judge was in error in holding that the plaintiff satisfied this burden of proof in establishing his case by a mere preponderance of the evidence.

We remand the case to the District Court with instructions to the trial judge to reconsider the evidence in the light of the applicable rule of clear and convincing evidence and report his conclusion to this Court. We retain jurisdiction of the appeal.

Appendix B

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

Civil Action No. C 63-29

[SAME TITLE]

KALBFLEISCH, J.

This case was tried and submitted on the record, the pleadings, exhibits, stipulations and admissions by counsel, and upon counsel's briefs.

The plaintiff, Harold S. Hobson, is a resident of the State of Indiana. The defendant Cyrus S. Eaton is a resident of the State of Ohio; defendant The Cleveland Trust Company is a corporate citizen domiciled in the State of Ohio and incorporated under the laws of Ohio; and Frank H. Hobson, Jr., and Frank H. Hobson, Jr., as Executor of the Estate of Myra S. Hobson, are residents of the State of California.

Plaintiff's complaint sets forth an action for a declaratory judgment pursuant to 28 U.S.C.A., Section 2201, for the purpose of determining questions of actual controversy between the parties. It is conceded that the Court has jurisdiction and that the matter in controversy exceeds $10,000.00.

Plaintiff alleges that Cyrus S. Eaton made certain loans to one Frank H. Hobson in the total amount of $10,000.00, and that said Frank H. Hobson died on March 31, 1936. These allegations are admitted by defendant Cyrus S. Eaton.

Plaintiff further alleges that defendant Cyrus S. Eaton, for good and valuable consideration, executed and delivered to plaintiff his irrevocable written assignment of Eaton's claims against the Estate of the said Frank H. Hobson arising from said loans and the interest accrued thereon. This allegation is denied by defendant Eaton; however, Cyrus S. Eaton admits he has asserted that he is the beneficial owner of said claims and has brought an action in the Court of Common Pleas of Cuyahoga County, Ohio against the Executor of the Estate of Frank H. Hobson, being case No. 776570, in which action Eaton did not make the plaintiff herein a party. Defendant Eaton admits that in his case in the Court of Common Pleas he seeks to establish his beneficial ownership of the above-mentioned claims.

Plaintiff concludes his first cause of action by alleging that he is the beneficial owner of said claims and is rightfully entitled to the proceeds of the settlement negotiated between plaintiff and the Executor of the Estate of Frank H. Hobson and others. This assertion of the plaintiff is specifically denied by defendant Eaton.

In plaintiff's second cause of action he alleges that Industrial Shares, Inc., a corporation, made certain loans to Frank H. Hobson, evidenced by Hobson's promissory notes payable to it, in the total sum of $17,500.00, and this assertion by plaintiff is admitted by defendant Eaton. Plaintiff further alleges that said promissory notes were negotiated

to the plaintiff, and this allegation is denied by defendant Eaton.

As to plaintiff's second cause of action defendant Eaton admits he has asserted that he is successor in interest to said corporation and as such successor in interest is the beneficial owner of said promissory notes and the claims thereon against the Estate of Frank H. Hobson, and that he has brought an action in the Court of Common Pleas of Cuyahoga County, Ohio (Case No. 776570) against the Executor of the Estate of Frank H. Hobson, in which he seeks to establish his beneficial ownership of said promissory notes and said claims.

Plaintiff concludes his second cause of action by alleging that he is the holder and beneficial owner of said promissory notes and claims and is rightfully entitled to the proceeds of the settlement negotiated between plaintiff and the Executor of the Estate of Frank H. Hobson and others. This allegation is specifically denied by defendant Eaton.

Plaintiff's third cause of action, in addition to incorporating by reference all of the statements and allegations made in his first and second causes of actions, alleges that plaintiff has settled all of the claims referred to in his first and second causes of action with the Executor of the Estate of Frank H. Hobson and with the beneficiary of said Estate. Plaintiff further alleges that pursuant to the settlement agreement said Executor paid said claims in part and the balance agreed upon as due was assumed by said beneficiary. Plaintiff further alleges that to secure payment to plaintiff of said balance said beneficiary deposited certain of his own funds in escrow with defendant The Cleveland Trust Company under an escrow agreement dated October 3, 1962 between plaintiff and the beneficiary,

Frank H. Hobson, Jr. Plaintiff further alleges that in accord with the provisions of said escrow agreement said beneficiary directed defendant The Cleveland Trust Company in writing to make a payment to plaintiff on January 1, 1963 from the said escrow fund in the amount of $8,999.95.

All of the foregoing allegations of the third cause of action are specifically denied by defendant Eaton; however, the foregoing allegations in the third cause of action are admitted to be true in the answers of The Cleveland Trust Company, Executor of the Estate of Frank H. Hobson, and in the answers of the beneficiary, Frank H. Hobson, Jr., and Frank H. Hobson, Jr., as Executor of the Estate of Myra S. Hobson.

Plaintiff caused to be attached to his complaint a copy of the settlement agreement, as Exhibit A, and a copy of the escrow agreement, as Exhibit B. The authenticity and legality of said documents are, for want of knowledge, denied by defendant Eaton, but are admitted by all other parties involved.

For all purposes of this lawsuit the Court hereby finds that the settlement was consummated as alleged and that Exhibits A and B attached to plaintiff's complaint are authentic. (Tr. 267-268, Pltf.'s Exs. 18 and 19.)

Plaintiff concludes his third cause of action by alleging that he has demanded of defendant The Cleveland Trust Company that it make payment to the plaintiff, but that said defendant has refused and still refuses to make said payment to plaintiff and has informed plaintiff that its refusal is due to defendant Cyrus S. Eaton's assertion of beneficial ownership of said claims. This latter allegation is admitted to be true in the answer of defendant The Cleveland Trust Company.

Plaintiff closes his complaint with the prayer that this Court adjudge that he is the beneficial owner of the claims described in his first and second causes of action, and that the Court further adjudge that he is rightfully entitled to the proceeds of the settlement and to the immediate payment of $8,999.95 from defendant The Cleveland Trust Company, and further prays for full and complete performance by defendant The Cleveland Trust Company of all of its obligations under the escrow agreement, and for costs of this action.

Defendant Cyrus S. Eaton, in addition to his answer wherein he takes issue with certain allegations and prayers of plaintiff's complaint, has filed a counterclaim seeking a declaratory judgment and naming as defendants not only the plaintiff and The Cleveland Trust Company but also, by leave of Court, naming Frank H. Hobson, Jr., and Frank H. Hobson, Jr., Executor of the Estate of Myra S. Hobson, deceased. The Cleveland Trust Company, in addition to its answer to plaintiff's complaint, has filed a counterclaim seeking a declaratory judgment; and defendants Frank H. Hobson, Jr., and Frank H. Hobson, Jr., Executor of the Estate of Myra S. Hobson, deceased, in addition to their answers, also assert counterclaims seeking a declaratory judgment.

On May 10, 1963, counsel for the respective parties named herein executed and filed the following stipulation:

> "It is hereby stipulated and agreed by and between the respective parties, through their undersigned attorneys, that:
>
> "1. The plaintiff having withdrawn his objection to the motion of the defendant Cyrus S. Eaton to add Frank H. Hobson, Jr., and Frank H. Hobson,

Jr., Executor of the Estate of Myra S. Hobson, deceased, as defendants and the court having granted the same, Frank H. Hobson, Jr., and Frank H. Hobson, Jr., Executor of the Estate of Myra S. Hobson, deceased, hereby enter their appearance and submit to the jurisdiction of the court.

"2. As soon as this case can be heard, the issues raised by the plaintiff's complaint and any defenses interposed thereto shall first be tried. If said issues are finally determined in favor of the plaintiff, this shall be regarded as a full and complete determination of all of the issues raised by any counterclaims filed by any of the parties to this stipulation and any defenses interposed thereto. If said issues presented by the plaintiff's complaint and the defenses interposed thereto are finally determined in favor of defendant Cyrus S. Eaton, the issues raised by the counterclaims shall then be tried.

"3. Reference is made to Case No. 37,413 docketed in this court and the stipulation of counsel therein of even date herewith with respect to the disposition of a motion by defendant Frank H. Hobson, Jr., in that case.

"4. The Cleveland Trust Company may plead by July 1, 1963."

On June 19, 1963, counsel for the respective parties executed and filed the following stipulation:

"It is hereby stipulated and agreed by and between the respective parties, through their undersigned attorneys, that plaintiff may plead to the counterclaims

of defendants Cyrus S. Eaton, Frank H. Hobson, Jr. and Frank H. Hobson, Jr., Executor of the Estate of Myra S. Hobson, deceased, after the issues raised by plaintiff's complaint and any defenses interposed thereto have first been tried."

Leave of Court having been granted, plaintiff filed a reply to the answer and counterclaim of defendant Cyrus S. Eaton, averring "that by reason of prior sworn denials of beneficial ownership of or interest in the claims referred to in plaintiff's first and second causes of action, defendant Eaton judicially admitted that he has no interest whatever in such claims, and he is therefore judicially and equitably estopped by such oaths now to assert that he is the beneficial owner of such claims."

A jury trial having been waived, trial to the Court began and was limited, in accord with stipulations of counsel, to the issues joined by the complaint of plaintiff Harold S. Hobson, the answer and counterclaim of defendant Cyrus S. Eaton, and the reply of plaintiff to the answer of defendant Cyrus S. Eaton. (Tr. 53.)

This case arose from a transaction which occurred on July 20, 1936, at which time defendant Cyrus S. Eaton executed an assignment wherein he did sell, assign and transfer to the plaintiff all his right, title and interest in his claim for $10,000.00 against the Estate of F. H. Hobson. (Pltf.'s Ex. 1.)

One of the many corporations in which defendant Eaton had an interest was Industrial Shares, Inc., a Delaware corporation formed in December of 1929; in fact, the undisputed testimony discloses that Eaton had full and complete control of said company by reason of his owning all of the outstanding shares of common stock. Plaintiff had

been associated with Industrial Shares since June 22, 1931. (Pltf.'s Ex. 8.) On April 30, 1935, the records of Industrial Shares carried the following entry: "* * * Notes receivable F. H. Hobson—$17,500. * * * Write off uncollectible notes receivable and interest accrued." (Pltf.'s Ex. 9-F.) There were three promissory notes, one for $12,500 and two for $2,500 each. (Pltf.'s Exs. 1-D, 1-E and 1-F.) The maker of the notes was F. H. Hobson and the payee therein was Industrial Shares, Inc. Regardless of when and how Hobson had obtained possession of the three notes, they bear the endorsement of Industrial Shares, Inc., signed by the secretary-treasurer L. G. Watson, and on July 20, 1936, defendant Eaton assigned the three notes to plaintiff at the time he assigned the aforementioned claim of $10,000. (Tr. 13 and 358.)

At the time of the execution of plaintiff's Exhibit 1 it was understood and agreed between plaintiff, H. S. Hobson, and defendant Cyrus S. Eaton that plaintiff was to file in his name a claim with The Cleveland Trust Company, Executor of the Estate of F. H. Hobson, said claim to consist of the three promissory notes of F. H. Hobson to Industrial Shares, Inc., Cyrus S. Eaton's check in the sum of $5,000 payable to F. H. Hobson and dated July 11, 1935, and a Cleveland Trust Company deposit slip dated November 20, 1935, evidencing a deposit for the checking account of F. H. Hobson in the sum of $5,000. (Pltf.'s Exs. 1-A and 1-G.) It was further understood and agreed that the assignment (Pltf.'s Ex. 1) should be presented as evidence of H. S. Hobson's ownership of said claim; however, it was further understood and agreed that plaintiff, H. S. Hobson, was the agent for collection only of this asserted claim and was required to account to defendant Cyrus S. Eaton for any collections he might receive.

In connection with the execution of plaintiff's Exhibit 1 and the entering into of the above stated agreement, a second document was prepared. This second document is plaintiff's Exhibit 2, which is identical with plaintiff's Exhibit 1 except that in addition to the provisions set forth in plaintiff's Exhibit 1 the following appears:

"Cleveland, Ohio, July 20, 1936.

"I herewith acknowledge receipt of the above claims which have been assigned to me for the purpose of collection, and I agree to pay to C. S. Eaton any proceeds thereof.

[Signed] H. S. Hobson"

Plaintiff has admitted the genuineness of plaintiff's Exhibit 2 and his signature thereon.

As between plaintiff, H. S. Hobson, and defendant Cyrus S. Eaton there is no dispute as to any of the facts heretofore stated. The issue between them is related to what transpired immediately after the execution of plaintiff's Exhibits 1 and 2. It is plaintiff's contention that on either July 20 or July 21, 1936, after plaintiff's Exhibits 1 and 2 were executed but before he actually filed the claim with The Cleveland Trust Company, Executor, he had a further understanding and agreement with defendant Eaton. Plaintiff testified that Mr. Eaton called him into his office and that Eaton said he had changed his mind about presenting the claim for collection in Hobson's name; that he could not afford to jeopardize the pending settlement with the banks by appearing directly or indirectly as a claimant against the estate of Frank Hobson. Plaintiff further testified that defendant Eaton then stated: "You take these

two claims as a salary bonus. The amount involved is very small at best, and subject to litigation there may not be anything left, but whatever comes out of this belongs to you." The foregoing assertions of plaintiff were denied by defendant Eaton.

Plaintiff, Hobson, and defendant Eaton have admitted that on July 21, 1936, the plaintiff filed his claims and sub-exhibits (Pltf.'s Exs. 1-A and 1-G) with The Cleveland Trust Company, Executor of the Estate of F. H. Hobson, and that said claims were allowed by the executor on September 17, 1936.

On February 11, 1938, the executor of the F. H. Hobson Estate made a partial distribution of the estate by executing a check payable to H. S. Hobson in the sum of $6,179.58. (Pltf.'s Ex. 17.) This exhibit bears but one endorsement, that of H. S. Hobson. The plaintiff disbursed the proceeds by paying into defendant Eaton's personal account with Otis & Company the sum of $1,961.91, and paid the balance to defendant Eaton. (Tr. 42, 381, 382, 383.)

Between the time of the filing of the claim, July 21, 1936, and the payment of the dividend on February 11, 1938, litigation in the State Court between Julia Hobson and the Frank Hobson Estate was terminated. Both plaintiff, Hobson, and defendant Eaton closely followed the progress of this litigation and knew of its outcome and of the dividend or distribution which was to be made by the executor of the F. H. Hobson estate. Plaintiff testified that on or about the date the executor distributed the dividend (February 11, 1938) he had a discussion with defendant Eaton wherein Eaton told him how valuable he was to him, that the future looked very promising for a comeback and that a settlement with the bank was very close to being com-

pleted. Plaintiff further testified that Eaton asked him to turn over the dividend that was coming from the Frank Hobson Estate, and that "we were sorely in need of cash at that time." Plaintiff testified that he agreed to turn over the dividend and then asked Eaton, "Now, should I turn over to you the dividend on the $10,000 and turn over to Industrial Shares the dividend on the $17,500?"; that Eaton answered, "No, turn it over to me"; and that Eaton further said, "The balance of it, of course, is yours. You may get something out of it some day." Plaintiff, Hobson, further testified that Eaton told him he would participate "in what was recovered out of our debacle at that time, and also participate in the going forward in the recovery that we expected to make." (Tr. 40, 41.) This testimony of plaintiff, Hobson, is denied by defendant Eaton.

On November 17, 1961, on requisition of Frank H. Hobson, Jr., the beneficiary of the estate of F. H. Hobson, the claim of plaintiff, H. S. Hobson, was rejected. (Incidentally plaintiff is not related to F. H. Hobson or Frank H. Hobson, Jr.)

On December 13, 1961, plaintiff, H. S. Hobson, filed a complaint in this Court, the same being Civil Case No. 37,412, against The Cleveland Trust Company as Executor of the Estate of Frank H. Hobson, Frank H. Hobson, Jr., and Frank H. Hobson, Jr., Executor of the Estate of Myra S. Hobson, seeking recovery on his claims. On October 3, 1962, case No. 37,412 was fully settled and terminated upon the terms and conditions contained in plaintiff's Exhibits 18 and 19.

In 1939 plaintiff and defendant Eaton entered into negotiations, the purpose of which was to terminate plaintiff's employment with defendant Eaton. These negotiations in-

cluded a final accounting as to the properties and other assets which defendant Eaton had caused to be placed in the name of and in the possession of plaintiff, Hobson. They included the execution of deeds and the surrender of possession of the property in which plaintiff and his family had been residing, and it was not until 1941 that the termination was finalized. In the course of these negotiations there were discussions between plaintiff and defendant Eaton; however, at no time were the claims of plaintiff against the Estate of F. H. Hobson mentioned or brought into the discussions. Defendant Eaton did not at any time communicate with plaintiff on the subject of the claims against the Estate of F. H. Hobson after February 11, 1938, until May of 1961 when Mr. William R. Daley notified plaintiff that Mr. Eaton was asserting his beneficial interest in said claims.

From the time of the filing of plaintiff's claim against the Estate of F. H. Hobson, on July 21, 1936, defendant Eaton did not notify or otherwise communicate his claim of ownership to any of the defendants in this case.

There is no dispute that plaintiff was employed by defendant Eaton personally from 1929 until sometime in 1939. From 1936 until his termination in 1941 plaintiff was employed by Otis & Company as a licensed salesman. Plaintiff was also employed by Industrial Shares, Inc., and served as an officer in that company from 1931 until its statutory death. As an employee of defendant Eaton plaintiff kept books; did all manner of odd jobs under the direction of Mr. Eaton; he held title in his name to real estate and other assets belonging to defendant Eaton; he supplied most if not all of the records and documents to the auditors preparing the Scovell-Wellington report

(Pltf.'s Ex. 25); and he prepared financial statements for defendant Eaton's signature. (Pltf.'s Exs. 4, 5 and 6.) Acting as defendant Eaton's nominee, plaintiff collected rents and managed properties; and from time to time he chauffeured defendant Eaton from his home to his office.

Defendant Eaton's activities and interests from 1929 until 1939 defy description. The record evidences that he owned or had a substantial interest in industrial businesses, banks and securities amounting to many millions of dollars. The collapse of the economy, commonly referred to as "the depression of the 1930's," reduced the value of his holdings to the point of insolvency; his debts exceeded his assets by many millions of dollars. Defendant Eaton was a partner in the firm known as Otis & Company, a corporation which dealt in securities and other banking activities on a world-wide basis. The partnership was heavily indebted to four banks in Cleveland which had been placed in liquidation under the control of the Superintendent of Banks. In addition to defendant Eaton's liabilities as a partner in Otis & Company, he was a guarantor for debtors indebted to Otis & Company. As would be expected of the liquidators of the closed banks, they diligently pursued an investigation into the affairs and assets of defendant Eaton and others.

Defendant Eaton, in selecting plaintiff as the nominee to hold real estate and other assets in plaintiff's own name, had a contract which required that plaintiff account to defendant Eaton for all transactions connected with his activities as nominee, and that he surrender unto defendant Eaton all of the said properties and assets upon defendant Eaton's request or demand. Defendant Eaton has testified that he had similar arrangements with others in his employ.

Defendant Eaton and others in his employ, principally William R. Daley, were vitally interested and active in ne-

gotiating a compromise with defendant Eaton's creditors, the principal creditor being Union Properties, Inc., and/or the liquidator of the closed banks. It would be unrealistic to overlook or ignore the apparent desire of defendant Eaton and those associated with him to salvage everything possible of value under the then existing circumstances. If defendant Eaton's placing of properties and assets in the names of others was not deliberately done to conceal his interest therein, it is apparent that his failure to disclose such items inured to his benefit as though he had so intended.

In the course of the negotiations leading up to the compromise and settlement of defendant Eaton's debts—which the evidence discloses he settled by his promissory note in the sum of $185,000.00—the defendant executed three financial statements. (Pltf.'s Exs. 4, 5 and 6.) Defendant Eaton was deposed on December 30, 1939 (Pltf.'s Ex. 22), and was again deposed on February 2, 1943 (Pltf.'s Ex. 23). It is plaintiff's contention that in plaintiff's Exhibits 4, 5 and 6 and the two depositions defendant Eaton not only did not disclose any interest in the claims against the F. H. Hobson Estate, but when asked in the depositions (Pltf.'s Exs. 22 and 23) to state what property or assets he owned in 1938, he did not state that he owned any interest in the claims against the F. H. Hobson Estate. The pages in plaintiff's Exhibit 22 upon which plaintiff relies are pages 1, 2, 7, 27-30, 39, 68 and 69; and the pages relied upon by plaintiff in plaintiff's Exhibit 23 are pages 14, 15, 23, and 42-45. Plaintiff's Exhibits 22 and 23 were admitted into evidence without objection by defendant Eaton.

Plaintiff urges that defendant Eaton's financial statements (Pltf.'s Exs. 4, 5 and 6) and Eaton's testimony in the

two depositions (Pltf.'s Exs. 22 and 23) are not only inconsistent with his present position in this case but are consistent with the allegations of the plaintiff herein. Plaintiff further urges that, based upon plaintiff's Exhibits 4, 5 and 6 and the cited pages of plaintiff's Exhibits 22 and 23, and the Scovell-Wellington report (Pltf.'s Ex. 25), defendant Eaton is prevented under the doctrine of preclusion from contradicting his own prior sworn statements. Both counsel for the plaintiff and defendant Eaton have exhaustively discussed and briefed their respective interpretations of the preclusion doctrine. Neither counsel has cited, nor has the Court found, any case or any authority for the application of the preclusion doctrine where the alleged contradictory or inconsistent sworn statements were made or uttered other than in a judicial proceeding. Many authorities have refused to apply the doctrine where there has been a failure to prove that the party now asserting preclusion relied on the prior contradictory or inconsistent statements. It is my conclusion that the doctrine does not apply in this case. Although I have concluded that the prior contradictory and inconsistent statements of defendant Eaton are insufficient to apply the doctrine of preclusion, I do find that such statements are of great importance in determining the credibility of defendant Eaton.

At the close of the plaintiff's case in chief, defendant Eaton requested leave to file an amended answer setting forth the statute of frauds. The Court suggested that counsel submit, in proper form, the answer he proposed to file. The Court finds such proposed amendment among the pleadings; however, it was never filed, nor does the record show that the Court acted upon the request to file such amended answer. Notwithstanding this state of the record, counsel

for both sides have exhaustively briefed the question of the application of the statute of frauds. The defendant insists that the statute in effect at the time of the alleged transfer of the claim from defendant Eaton to plaintiff, Hobson, was Ohio General Code Section 8384, and that since the evidence discloses that the transfer involved a chose in action of the value of more than $2,500, and the transfer was neither partially performed nor in writing, that therefore plaintiff is barred from any judgment or relief sought in plaintiff's complaint. This contention of defendant Eaton must fall for two reasons: (1) the transfer was fully performed at the time plaintiff filed the claims with the executor; and (2) the act of transfer was nothing more than a modification of the written agreement evidenced by plaintiff's Exhibits 1 and 2. It is therefore my conclusion that the statute of frauds is not applicable.

It is my conclusion and judgment that plaintiff, Hobson, has proved by a preponderance of the evidence that he is the true and beneficial owner of the claims described in plaintiff's first and second causes of action and is rightfully entitled to the proceeds of the settlement thereof in accord with plaintiff's Exhibits 18 and 19. It is my further conclusion that defendant Cyrus S. Eaton has no interest whatever in the claims described in plaintiff's first and second causes of action.

The foregoing is adopted as findings of fact and conclusions of law pursuant to Rule 52(a) of the Federal Rules of Civil Procedure.

GIRARD E. KALBFLEISCH
United States District Judge

Appendix C

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 17480

HAROLD S. HOBSON,

Plaintiff-Appellee,

v.

CYRUS S. EATON,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, E.D.

Decided September 20, 1968.

Supplement to opinion of February 12, 1968.

Before: PECK and McCREE, Circuit Judges, and CECIL, Senior Circuit Judge.

CECIL, Senior Circuit Judge. In our opinion of February 12, 1968, we held that the burden was on plaintiff, Harold H. Hobson, to prove by clear and convincing evidence that the defendant, Cyrus S. Eaton, had relinquished his beneficial interest in claims against the estate of Frank Hobson, and that he had made a gift of such claims to him. We con-

cluded that the trial judge was in error in holding that the plaintiff satisfied this burden of proof in establishing his case by a mere preponderance of the evidence.

Retaining jurisdiction of the appeal, we remanded the case to the District Court with instructions to the trial judge to reconsider the evidence in the light of the applicable rule of clear and convincing evidence and report his conclusion to this Court. In compliance with this remand, the trial judge concluded in a report entitled "Conclusion Upon Remand" filed in this Court and made a part of the record on this appeal, "that the plaintiff, Harold S. Hobson, has proved by clear and convincing evidence that he was the recipient of a gift, from the defendant Cyrus S. Eaton, of the beneficial interest in the claims involved herein."

We have considered the report of the trial judge together with the briefs of the parties with reference thereto and conclude that the supplemental finding of the trial judge is supported by the evidence and is not clearly erroneous.

Judgment of the District Court is affirmed.

Appendix D

In conformity with Rule 77 (d) F.R.C.P. please take notice that the following order or judgment was entered in this court on Jun 27 1968.

J. A. Green, Clerk

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

CIVIL ACTION No. C 63-29

HAROLD S. HOBSON

v.

CYRUS S. EATON, et al.

CONCLUSION UPON REMAND

KALBFLEISCH, Ch. J.

The Court is in receipt of a mandate dated May 27, 1968 and filed with the Clerk of this Court on May 28, 1968. The mandate is a remand to this Court for further proceedings in conformity with the opinion of the Court of Appeals filed with the Clerk, Carl W. Reuss, on February 12, 1968.

On page 7 of its opinion the Court of Appeals stated as follows:

"The trial judge was in error in holding that the plaintiff satisfied this burden of proof in establishing his case by a mere preponderance of the evidence.

"We remand the case to the District Court with instructions to the trial judge to reconsider the evidence in the light of the applicable rule of clear and convincing evidence and report his conclusion to this Court. We retain jurisdiction of the appeal."

In conformance with the February 12, 1968 opinion of the Court of Appeals and upon a careful and thorough reconsideration of the evidence, the appendix to brief of defendant-appellant, and the appendix to brief of plaintiff-appellee, the Court finds and concludes that the plaintiff, Harold S. Hobson, has proved by clear and convincing evidence that he was the recipient of a gift, from the defendant Cyrus S. Eaton, of the beneficial interest in the claims involved herein.

/s/ GIRARD E. KALBFLEISCH
Chief Judge

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JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1968.

No. 985.

CYRUS S. EATON,

Petitioner,

vs.

HAROLD S. HOBSON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF IN OPPOSITION.

SIDNEY D. L. JACKSON, JR.,
ALEXANDER H. HADDEN,
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Cleveland, Ohio,
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In the Supreme Court of the United States

OCTOBER TERM, 1968.

No. 985.

CYRUS S. EATON,

Petitioner,

vs.

HAROLD S. HOBSON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF IN OPPOSITION.

QUESTION PRESENTED.

Did the courts below fail to comply with the requirements of Rule 52(a) or so far depart from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision, when the District Court (a) rendered specific findings as to such ultimate facts as were necessary to decide the case, and (b) concluded upon remand after a careful and thorough reconsideration of the oral and documentary evidence that Respondent proved by clear and convincing evidence that he was the recipient of a gift, and the Court of Appeals, upon consideration of the District Court's findings, affirmed the decision below.

REASONS FOR DENYING WRIT.

While Respondent does not accept Petitioner's Statement of the Case, Respondent will not burden the Court with a Counterstatement in view of the fact that the facts, even as stated by Petitioner,[1] do not give rise to a case that requires exercise of this Court's power of supervision.

The writ of certiorari should be denied because:

(1) The Findings Below, Giving Due Regard to the Opportunity of the Trial Court to Judge of the Credibility of the Witnesses, Are Consistent With and Required By the Record Evidence.

Petitioner's arguments concerning the asserted legal insufficiency of the findings and decisions below are in reality nothing more than an attack on the conclusions reached below concerning credibility of the witnesses (Pet., pp. 8-12).[2]

The District Court made a most explicit finding that its decision rested essentially on a belief in the testimony of Respondent, which was amply supported by numerous documentary exhibits, and a disbelief in the testimony of Petitioner. Its ultimate finding of fact was that Respondent "is the true and beneficial owner of the claims" and that Petitioner "has no interest whatever" in them

---

[1] It is important, however, to point out with respect to page 5, footnote 2 of the Petition that this case is in no way connected with *Cleveland Trust Co. v. Eaton*, 11 Ohio Misc. 151, 229 N.E.2d 850 (1967). No aspect of that case can have any possible bearing on this case.

[2] The following abbreviations will be used throughout this Brief:

Pet., p. __: The Petition for Writ of Certiorari.

App., p. __: The Appendices to the Petition for Writ of Certiorari.

(App., p. 24a).[3] This finding obviously amounts to a determination that the assignment to Respondent was outright and unconditional, and not "for collection only" as testified to by Petitioner.

This Court said in *Adamson v. Gilliland*, 242 U.S. 350 (1917), that when the lower court's findings of fact are based in substantial measure on oral testimony and the validity of the trial court's findings depend upon whether the witnesses before him spoke the truth, the accepted rule is that such findings "must be treated as unassailable." This is particularly true, as in this case, of "findings as to design, motive and intent with which men act" for such findings "depend peculiarly upon the credit given to witnesses by those who see and hear them." *United States v. Yellow Cab Co.*, 338 U.S. 338, 341 (1949). "[A]nd upon an issue like the witness' own intent, as to which he alone can testify, the finding is indeed 'unassailable,' except in the most exceptional cases." *United States v. Aluminum Co. of America*, 148 F.2d 416, 433 (2d Cir. 1945).[4]

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[3] The District Court's ultimate finding as to the ownership of the claims is directly supported by two subsidiary findings which are based upon numerous documentary exhibits as well as Respondent's testimony. *First*, the court found that certain prior sworn statements made by Petitioner were "inconsistent" with his claim of ownership in the present case and that "such statements are of great importance in determining the credibility of" Petitioner (App., p. 23a). *Second*, the District Court refers to a substantial amount of record evidence in its findings which demonstrates a course of conduct on Petitioner's part during the years in question which, if not deliberately calculated to place assets beyond the reach of creditors, nonetheless had that effect (App., pp. 21a-22a).

[4] This Court also held in *United States v. Oregon State Medical Society*, 343 U.S. 326, 332 (1952), that there is no case more appropriate for adherence to Rule 52(a), which provides that where an action is tried by a court without a jury, "findings of

(Continued on following page)

In the instant case, the District Court prepared fifteen pages of "Findings of Fact and Conclusions of Law" (App., pp. 9a-24a).[5] While these findings do not traverse every subsidiary detail of the evidence, they refer to numerous exhibits in support of Harold Hobson's testimony and the court's ultimate conclusion that Harold Hobson "is the true and beneficial owner of the claims" (App., p. 24a). Also, the District Court makes reference to prior sworn statements of Eaton and other documentary evidence as bearing on credibility in rejecting Eaton's testimony that the assignment in question was "for collection only" (App., p. 23a).

(2) The District Court Complied With the Requirements of Rule 52(a) in Rendering Findings as to Such Ultimate Facts as Were Necessary to Decide the Case.

Petitioner's assertion that the District Court's findings do not comport with the requirements of specificity set forth in Rule 52(a) has no support in fact or law.[6] The

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(Continued from preceding page)

fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of witnesses," than one in which there is "a vast record of cumulative evidence as to long-past transactions, motives, and purposes, the effect of which depends largely on credibility of witnesses."

[5] Although the District Court's decision was denominated "Findings of Fact and Conclusions of Law," Petitioner has omitted that caption in reprinting the decision in its Appendix to this Petition (See App., p. 9a). The District Court's decision also expressly states that it "is adopted as findings of fact and conclusions of law pursuant to Rule 52(a) of the Federal Rules of Civil Procedure" (App., p. 24a).

[6] If Petitioner had seriously believed that the District Court's findings were inadequate, it is curious that he did not seek to have that court amplify or amend its findings through Rule 52(b), which provides that "upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly."

test as to the legal sufficiency of a trial court's findings is whether they "set forth the ultimate facts together with sufficient findings to support the court's opinion and judgment." *Young v. Murphy*, 9 FED. RULES SERV. 52a.11, Case 2 (N.D. Ohio 1946). Thus, a trial court need only make brief, definite, and pertinent findings and conclusions upon contested matters without elaboration extending into minute and unnecessary details on every facet of the case. 5 MOORE, FEDERAL PRACTICE ¶ 52.06[1], at 2653 (2d ed. 1964).[7]

The District Court's findings and conclusions in the instant case meet the highest standard of adequacy under Rule 52(a). "[W]hile counsel may be disappointed that findings do not discuss propositions sincerely contended for, that, alone, does not make them inadequate or suggest that such propositions were not understood by the court." *Schilling v. Schwitzer-Cummins Co.*, 142 F.2d 82, 84 (D.C. Cir. 1944).[8]

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[7] See the Advisory Committee Note to Rule 52(a), reprinted in 3A BARRON & HOLTZOFF, FEDERAL PRACTICE & PROCEDURE 477 (1961), where it is stated that the trial court's findings "should represent the judge's own determination and not the long, often argumentative statements of successful counsel * * *. [And] the judge need only make brief, definite, pertinent findings and conclusions upon the contested matters; there is no necessity for over elaboration of detail or particularization of facts. * * *" (Citations omitted.)

[8] In *Elam v. United States*, 250 F.2d 582, 583 (6th Cir. 1958), the court found that "the trial judge filed a six page memorandum decision, setting out his basic findings and conclusions in considerable detail, and no separate findings of fact and conclusions of law were filed. The memorandum decision, while not containing specific findings on every subsidiary evidentiary issue amply complied with the requirements of Rule 52 of the Federal Rules of Civil Procedure, 28 U.S.C.A. Accordingly the judgment is affirmed."

(3) The Decisions Below Have Not Departed From the Accepted and Usual Course of Judicial Proceedings So as to Call For an Exercise of This Court's Power of Supervision.

There are plainly no grounds in this case for an exercise of this Court's power of supervision under its Rule 19. The District Court decided after a lengthy trial of eight days and the submission of exhaustive briefs on the facts and law by both parties that Respondent was the true and sole owner of the claims in question. The findings of the District Court cover with more than adequate detail, and with compelling support in the evidence, all of the issues of fact essential to that decision.

The Court of Appeals, upon review of the District Court's findings and the evidence, concluded that any relinquishment of Petitioner's ownership in the claims in favor of Respondent would constitute a gift inter vivos, and hence that under Ohio law such a gift had to be proved by clear and convincing evidence.[9] Accordingly, it remanded the case to the District Court for a determination as to whether Respondent had established the facts supporting that conclusion by such standard of proof (App., p. 8a). The District Court concluded upon remand after a "careful and thorough reconsideration of the evi-

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[9] The Court of Appeals defined what is meant by clear and convincing evidence under Ohio law as being " 'that measure or degree of proof which will produce in the mind of the trier of facts a firm belief or conviction as to the allegations sought to be established. It is intermediate, being more than a mere preponderance, but not to the extent of such certainty as is required beyond a reasonable doubt as in criminal cases. It does not mean clear and unequivocal.' *Cross v. Ledford*, 161 Ohio St. 469, 120 N.E.2d 118, 123 (1954)." (App., pp. 6a-7a, n. 2.)

dence" [10] that Respondent "has proved by clear and convincing evidence that he was the recipient of a gift, from the defendant Cyrus S. Eaton, of the beneficial interest in the claims involved herein" (App., p. 28a).

Upon consideration of the District Court's "Conclusion Upon Remand" and the briefs of the parties with reference thereto, the Court of Appeals found "that the supplemental finding of the trial judge is supported by the evidence and is not clearly erroneous," and accordingly affirmed the judgment of the District Court (App., p. 26a).

It is evident from the foregoing that both of the courts below were conscious of their responsibilities and the requirements of Rule 52(a). In short, it is submitted that they were careful to avoid any departure "from the accepted and usual course of judicial proceedings" in rendering their respective decisions.

CONCLUSION.

For the reasons stated above, Respondent respectfully submits that this case presents no important question of federal law; that the decisions below fully comply with all of the requirements of Rule 52(a); that the courts below have not sanctioned nor has there been any

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[10] Petitioner complains that the District Court did not indicate in the Conclusion Upon Remand "what evidence it had relied upon as being clear and convincing" (Pet., p. 9). However, the District Court expressly stated that in reaching its conclusion it considered: (1) appendix to brief of defendant-appellant; and (2) appendix to brief of plaintiff-appellee (App., p. 28a). The latter two items contain most of the transcript of testimony given at the trial, as well as a substantial number of the most pertinent exhibits introduced and relied upon by the parties at the trial.

departure from the accepted and usual course of judicial proceedings so as to require an exercise of this Court's power of supervision; and that accordingly the writ of certiorari should be denied.

Respectfully submitted,

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